In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1614

WENDEL EVERETT LOWRY AND
LOWRY INVESTMENTS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the District of Colorado, petitioners and co-defendant Lowther[1] were convicted of fraud in the sale of securities, in violation of 15 U.S.C. 77q(a). Petitioner Wendell E. Lowry was sentenced to four months' imprisonment, followed by twenty months' probation. Petitioner Lowry Investments, Inc. was fined $1,000. The court of appeals affirmed in a comprehensive opinion (Pet. App. A1-A18).

[1] Lowther has filed a separate petition for a writ of certiorari to which we have filed a separate response (No. 71-6569, this Term).

The relevant evidence is set out in the opinion of the court of appeals. In brief, it showed that petitioner Lowry, owner of petitioner Lowry Investments, Inc. of Colorado Springs, Colorado, gained control of three dormant mining companies, one of which was the Elkton Company. Lowry maintained personal control of the companies. In 1965 Lowry retained a company, which was controlled by codefendant Lowther, as his "financial manager." Thereafter, Elkton authorized the sale of a million and a half shares of its common stock at one-tenth of a cent per share. The shares were purchased by petitioner Lowry, codefendant Lowther and their nominees. As a result of various manipulations detailed in the opinion below, including the making of numerous false representations in investment letters and press releases at the direction of petitioner Lowry and Lowther, the market price of Elkton stock rose substantially. Petitioner Lowry and codefendant Lowther then sold their stock in Elkton at artificially inflated prices.

Count I of the indictment, the only count on which petitioners were convicted, involved the sale of Elkton stock to a Mrs. Betty Jolkovsky of Atlanta, Georgia. In December 1965, she received a Lowry newsletter which described Elkton as the potential speculation of the year. She wrote to Lowry, requesting additional information about Elkton, and enclosed a check for $120 to purchase 6,000 shares at the listed price of two cents (Tr. 385–386; Exh. 1–B).[2] She received a reply

[2] "Tr." refers to the transcript in No. 71–6569 (Lowther) which is on file with the Clerk.

dated December 11, indicating that the order could not be filled because the price had advanced to 4½ cents (Tr. 390; Exh. 1–D). In a letter which she wrote to Lowry on December 15, Mrs. Jolkovsky agreed to purchase from Lowry 2,500 shares of Elkton at the 4½ cents price, and requested him to apply the balance of the $120 ($7.50) to future orders. She also placed an order for 10,000 shares at four cents (Exh. 1–G, 1–H). Thereafter, she received an Elkton stockholders' letter prepared on the basis of false and misleading information supplied by Lowther (Pet. App. A 6), listing the credentials of the new directors and announcing ties with other companies. She also received a Lowry investment letter for December 31, 1965 (Exh. 1–I, 1–K). Encouraged by the positive information contained in these reports, Mrs. Jolkovsky made additional purchases of Elkton stock from other investment companies—4,000 shares at 7¾ cents and 3,000 shares at 8 cents on January 10, 1966 (Exh. 1–N, 1–R). One of these companies sent her copies of newspaper articles which carried an announcement of Elkton's acquisitions based on a press release for which Lowther had supplied false and misleading information (Tr. 411; Pet. App. A 7). She did not receive any indication that the Elkton subsidiaries were failing companies, or that Lowry and Lowther had personally acquired large amounts of Elkton stock at less than one cent per share, and had made enormous profits in selling the stock (Tr. 480–482). In April, she purchased 4,000 more shares at 9 cents from petitioner Lowry Investments (Exh. 1–DD). At the time of trial,

Mrs. Jolkovsky still owned the Elkton shares (Tr. 527; Pet. App. A. 7).

Petitioners' principal contentions here—including an alleged improper denial of a severance—relate to claims of prejudice from the receipt of evidence inculpating co-defendants in their joint trial with petitioners. The court of appeals properly concluded that since "Lowry and Lowther were shown to be participants in a scheme to defraud purchasers of Elkton stock" and each was protected by an instruction admonishing the jury not to consider evidence against a defendant if he was not tied thereto, the district court did not abuse its discretion in denying a motion for severance (Pet. App. A 10). Moreover, the district court gave proper instructions (to which no objection was made) regarding the use the jury could make of a codefendant's statements or acts in furtherance of the scheme (Pet. App. A 11–13). Similarly the district court properly handled the documentary evidence initially received against codefendants only, as the court below found (see Pet. App. A 14–15).

The alleged factual errors in the opinion of the court of appeals—brought to that court's attention in a petition for rehearing which was denied—do not relate to matters of substance and provide no reason for a grant of certiorari.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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